

05-777 DEC 16 2005

No.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN
SERVICES FINANCE AND SUPPORT, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to institutionalization.

PARTIES TO THE PROCEEDING

The petitioner in this Court is the United States of America, which intervened in the court of appeals, pursuant to 28 U.S.C. 2403, to defend the constitutionality of the abrogation of Eleventh Amendment immunity in Title II of the Americans with Disabilities Act of 1990.

The respondents are the Nebraska Department of Health and Human Services Finance and Support, the Nebraska Department of Health and Human Services, Stephen B. Curtiss, in his official capacity as the Director of Nebraska Department of Health and Human Services Finance and Support, and Ron Ross, in his official capacity as the Director of Nebraska Department of Health and Human Services, all of whom were the defendants below.

The private plaintiffs below are also respondents: Bill M., by and through his father and natural guardian, William M., and on behalf of themselves and all other persons similarly situated; John Doe, by and through his mother and natural guardian, Jane Doe, and on behalf of themselves and all other persons similarly situated; Heather V., by and through her mother and guardian, Marcia V., and on behalf of themselves and all other persons similarly situated; Jane S., by and through her mother and natural guardian, Patricia S., and on behalf of themselves and all other persons similarly situated; Kevin V., by and through his mother and legal guardian, Kathy V., and on behalf of all other persons similarly situated; Jennifer T., by and through her parents and legal guardians, Sharon T. and Greg T., and on behalf of themselves and all other persons similarly situated; William M., on behalf of his son, Bill M.; Jane Doe, on behalf of her son, John Doe; Marcia V.,

III

on behalf of her daughter, Heather V.; Patricia S., on behalf of her daughter, Jane S.; Kathy V., on behalf of her son, Kevin V.; Sharon T., on behalf of her daughter, Jennifer T.; and Greg T., on behalf of his daughter, Jennifer T.



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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 408 F.3d 1096. The opinion of the district court (App., *infra*, 9a-10a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 27, 2005. The petitions for rehearing filed by the United States and by the private plaintiffs were both denied on August 18, 2005 (App., *infra*, 11a). By order of November 4, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and

including December 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 12a-33a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C.

12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7).¹

2. The plaintiffs, Bill M., *et al.*, are individuals with mental retardation and other developmental disabilities and their guardians. They seek medical services from the State of Nebraska through programs that receive federal financial assistance under the Medicaid Act, 42 U.S.C. 1396 *et seq.* The plaintiffs allege, *inter alia*, that Nebraska is violating Title II of the ADA, as interpreted by this Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002), by offering plaintiffs medical services exclusively in institutional settings, when services could be provided in less restrictive community placements without fundamentally altering the nature of the State's medical programs or

¹ Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002). See 42 U.S.C. 12134.

imposing an undue financial or administrative burden. App., *infra*, 2a-3a; U.S. C.A. Br. 4.

Plaintiffs sued the state agencies and officials responsible for administering the State's Medicaid program, seeking only declaratory and prospective injunctive relief. Nebraska moved to dismiss the plaintiffs' Title II claims against the state agencies on the ground of Eleventh Amendment immunity. The district court denied the motion. App., *infra*, 9a-10a.

3. a. Nebraska filed an interlocutory appeal, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity.

The court of appeals reversed. App., *infra*, 1a-8a. Previously, the en banc Eighth Circuit had held that Title II, in its entirety, is not a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. *Alsbrook v. City of Maudelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. dismissed, 529 U.S. 1001 (2000). The court of appeals held that *Alsbrook* compelled dismissal of the plaintiffs' Title II claims on Eleventh Amendment grounds. App., *infra*, 6a. In so ruling, the court rejected the United States' argument that this Court's intervening decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), superseded *Alsbrook*. The court of appeals reasoned that "*Alsbrook* has been modified by *Lane*" only for "a discrete application of Title II abrogation—related to claims of denial of access to the courts." App., *infra*, 6a. The court also rejected the United States' argument that, because the identical relief against the identical state defendants in the same federal court is already available under the plaintiffs' Rehabilitation Act claim,